

**Water Pollution Control Advisory Council Meeting
December 6, 2000 9:30 a.m. - 11:55 a.m.
Fish, Wildlife & Parks Conference Room**

Attendees

Council Members

Richard Parks, Fishing Outfitters Assoc. of Montana
Dan Sullivan, Dept of Agriculture
Don Skaar, Dept of FW&P
Roger Noble, Land & Water Consulting
Robert Willems, Conservation Districts
Barb Butler, Municipal Government

Other Attendees

Jan Sensibaugh, Dept of Environmental Quality (DEQ)
Art Compton, DEQ
Bob Raisch, DEQ
Bonnie Lovelace, DEQ
Claudia Massman, DEQ
Abe Horpestad, DEQ

Approval of Minutes

The meeting was called to order by Chairman Richard Parks at 9:45 a.m. Minutes from the conference call on August 17, 2000 were approved.

Briefing on the Department's Water Quality Related Legislative Proposals.

Art Compton – LC0288

Mr. Compton said one piece of proposed Water Quality legislation has to do with modification of the Water Quality Act as it relates to temporary water quality standards. The Montana Department of Environmental Quality (department) has been working with ASARCO on temporary Water Quality Standards for the upper Big Blackfoot mining complex. ASARCO purchased the property and wanted to do a comprehensive cleanup of the area without being subject to water quality violations during the term of the cleanup. The department petitioned the Montana Board of Environmental Review (BER) for temporary water quality standards for ASARCO and was successful. In doing this the department found it should have more information when presenting a need like this to BER. LC0288 would require an applicant to work with the department to prepare a preliminary implementation plan that would be taken to the BER for review and discussion in advance of rulemaking. The legislation would also require annual workplans so the department would be able to go back to BER and modify as needed.

Mr. Compton will make copies of the legislation and fact sheet and distribute them to the board members. He said Vicki Younkin, Chairman of the House Natural Resources Committee, will be carrying the bill for the department.

Jan Sensibaugh – LC0271 and LC0272

Ms. Sensibaugh said both pieces of legislation have to do with the public water supply and just clean up and clarify language. LC0271 eliminates from the definition of water treatment plant “discharges in effluent directly into state waters.” This just clarifies that wastewater treatment plants have to have a certified operator. The department feels that every wastewater treatment plant needs to have a certified operator since you can have public health problems with them if they are not operated properly, whether they discharge directly into state waters or not.

It removes a phrase from the wastewater operator certification law that exempts systems that service less than ten families from the requirement to have a certified operator for public water supply systems. This phrase conflicts with the requirement of 15 or more service connections or 25 or more people that is in the act and which phrase will be the definition used. Also clarified is that the connection definition does not exempt any industrial users from needing a certified operator.

LC0272 removes the phrase “a period of” from the definitions of public sewage system and the public water supply system. This is because people got confused about whether it meant delivering water for 60

consecutive days or just 60 days throughout the year. The department is clarifying that it is a total of 60 days in a calendar year and not necessarily 60 consecutive days.

Added are the words “or continue” to the section that states “a person may not commence construction, operation, extension or operation of a public water supply system.” The reason for this is that people would begin to construct a public water supply system without approved plans and specs. Since the act read “commence construction,” they felt they could continue construction since they had started as the penalty would be the same. That was not the intent of the legislation. The intent is that for everyday they continue construction without approval from the department, they are subject to a penalty. This phrase clarifies the intent and they are subject to a daily penalty for every day they construct rather than just a one-time penalty.

Another problem the department has faced is who owns the public water supply systems or the sewage systems. The department has had some unincorporated homeowners’ associations that were approved as owners and operators only to fail to maintain the systems because of lack of money or interest. The department tries to determine who is responsible only to find the entities don’t exist anymore and it falls to the state, county or city to manage the system. So the department would like to tighten the language so that entities named will be responsible for operating and maintaining the facilities and will be there in perpetuity.

Jan Sensibaugh for John Arrigo – LC0353 and LC0371

This bill provides for administrative penalties, establishes those penalties, and standardizes them as much as possible across the statutes. It creates the procedures that the department will follow when the administrative penalty orders are issued and collected. The legislation lists factors considered when an administrative penalty is calculated such as nature, extent, circumstances, duration of the violation, economic benefit of noncompliance, size and history of the violator (has a good faith effort been made to comply) and the violator’s ability to pay. All of these factors will be delineated in the legislation as something to be considered when establishing the administrative penalties.

The second proposed legislation would give the department discretion to assess administrative penalties for water quality violations, revises the administrative penalty procedures for certain acts and revises the department authority to assess administrative and civil penalties under the coal, uranium, metal and open cut mine reclamation laws. Under the present law the department sends the violator a notice letter that describes the collective action and the administrative penalty that will be assessed if the correction action is not taken. Usually these are corrected immediately upon receipt of the letters and so enforcement action cannot be taken. When the violation is egregious enough or repeated, the department feels they should be able to collect a penalty even though corrected.

Ms. Sensibaugh said the legislation takes the old reclamation mining laws (coal, open cut, metal mine, hard rock) and standardizes them to make them consistent with the procedures used in the other acts in the department.

In response to a question it was said that a citation letter would list the violated rule, the violated permit condition, and tell what it means and what was needed to fix it.

In response to a question of whether these were companion bills, Ms. Sensibaugh said they were and contain coordinating language so similar language would be in the statute only once.

There is language to change the appeal route of the administrative penalties – at present depending on the statute you can appeal to the BER or the director of Environmental Quality. It is the thought of the department that the appeals should all go to the BER, as the Director of DEQ would have already approved the point in question.

Sandi Olsen had no bills related to water quality so made no presentation.

Ms. Butler asked about LC 0914 – to modify storm water discharge permit laws; and LC 0915- to modify total maximum daily load laws. The sponsor of both was Arnie Mohl. Mr. Raisch said he was unaware of these as drafts must not be available as yet. He would check and keep the group informed.

Briefing on the Department's Proposed Guidelines for Rip Rap: Bonnie Lovelace, DEQ.

In the mid-90s the Yellowstone Conservation District came to the department and requested help in controlling the use of concrete as rip rap. A group was formed of the conservation districts and other interested parties and a policy was devised to establish a minimum standard for the use of concrete – specifications as to quality, hardness and size when used as rip rap. This was adopted in 1997 with an agreement that it would be reworked. This past year the group came together again and has tightened the policy requirements on concrete. Other materials are preferred to concrete and this is mentioned. Concrete with rebar cannot be used – before this you could use demolition materials containing rebar by cutting off any rebar sticking out. Concrete will degrade and fall off and the rebar will be at the river bottom. In some areas of the state good angular hardrock may not be available, so sandstone is permitted and described somewhat. While this wasn't a major effort in the sense of triggering the Montana Environmental Protection Act (MEPA), we went ahead and did MEPA compliance and sent out the environmental assessment (EA) and took comments. A copy of the response to comments is available to the members. Ms. Lovelace said the comments were the full spectrum – from banning concrete to why are you worrying about using concrete, from using tires bolted together and other ideas of what to do for streambed stabilization – good ideas but out of our present scope of what we are trying to do here. The department did not rewrite the draft EA, but did answer all the questions. The answer was no to using tires bolted together, no to completely banning concrete but we feel the environmental situation has been improved. Rip rap is not encouraged - but when used – use clean material – trash will not be approved. There is a reporting requirement for where you get your material so you won't cross the line taking waste that would kick you into the Solid Waste Act, and turn your rip rap situation into a landfill on the river bank. The department felt they needed to keep a closer eye on the situation and do more inspection plans and get out and look and use enforcement when the need arises.

The conservation districts wanted to add this information to their manual and make it available. They wanted to have the choice of using this either as a technical guide or turning parts into a rule. This EA is the final at this point and will be used as a technical guide to say do you have the right stuff in your plan. Each plan will be looked at individually under the permitting regulations. We will bring the guide into all the permitting programs which is why it is not going in as a rule. The department wanted it in place for the next field season and getting it adopted in December will allow that. A mass mailing is being done to interested parties to make this policy known. It is a big improvement over the other ones.

It was suggested the mailing also go to the open cut and gravel pit people as they are a source of materials.

A question was raised on what is wrong with tires. Ms. Lovelace said tires break down differently which causes chemical impacts and so pollutants to the water. Tires don't stay put and materials used to attach them to the bank and to each other also adds pollutants to the water. Chairman Parks also mentioned that a whole bunch of tires on a river bank creates a mosquito farm.

Chairman Parks asked if it wouldn't be appropriate for the advisory board to see the proposals amending the hardrock and metal mine bonding requirements. While they are not specifically water quality issues, they could end up affecting water quality. Chairman Parks said if they knew about the structure of the permit and bonds they might be able to address water issues and had hoped to see this on the agenda. Mr. Raisch said he would see the group gets copies.

Update on Coal Bed Methane EIS.

Bob Raisch

Mr. Raisch said the DEQ was appointed as the state lead in regard to the EIS on coal bed methane development. He said they are working with the Board of Oil and Gas and with the Miles City Office of the Bureau of Land Management (BLM) to put together a single EIS that will address the needs of all three agencies. The state needs a MEPA review for permitting actions. The Board of Oil and Gas is updating their old programmatic oil and gas EIS to include coal bed methane and the BLM is interested because they are in the process of revising their area management plans. Funding of the EIS will be joint – Board of Oil and Gas \$520,000 (\$400,000 from the Department of Energy for an EIS), BLM - \$830,000, and DEQ has applied for a \$250,000 resource development grant program and has \$60,000 in matching funds from DEQ's existing budget. Plans are to have public scoping meetings in January at Billings, Helena, Miles City, Broadus and Colstrip. There has been an informal coal bed methane group meeting for about a year and a half composed of members from industry, county commissioners,

state and federal agencies, environmental groups and citizens. This group felt a maximum build-out scenario for Montana was needed and requested an estimate from industry. Industry suggested the maximum build-out scenario to be about 10,000 producing wells in Montana not including wells on tribal lands. They felt the wells would be located in southeastern Montana probably in Big Horn, Rosebud, and Powder River counties – the Colstrip, Ashland, and Decker areas. But the Board of Oil and Gas has exploratory drilling proposed for as far west as the Bozeman Pass, so the affected area could be bigger. Coal bed methane occurs in subuminous or better grade coal where the coal beds are 20 to 40 feet thick and the overburden is up to 400 feet. There is talk of potential coal bed methane in the Sand Coulee area south of Great Falls and other areas. So the big question is whether to just focus on southeast Montana or look at the bigger picture. After the scoping it may be determined that the potential for coal bed methane is low to nonexistent in other parts of the state and the focus will be back down on southeast Montana, but for now the group will check other areas. Now the focus is on how to fill needed data gaps and gather other data and to be able to finish the EIS in 12 to 18 months.

A question was raised on the status of the wells at Redstone. Mr. Raisch said a permit was issued to discharge to Tongue River. This permit as issued has been appealed by the Northern Plains Resource Council (NPRC) and some others. One of the focuses of the appeal was nondegradation. Due to the way the statutes are written they cannot appeal to the Board so they plan to go to court. Redstone is producing methane and are discharging to the Tongue River and Mr. Raisch said he understands they are meeting the 1600 gallon a minute limit. A concern is whether they can produce all the gas they want and stay within that limit.

Art Compton

Mr. Compton mentioned the water produced by coal bed methane operations is a byproduct and therefore disposal of that water is not a beneficial use and therefore does not require a water right.

Mr. Compton said he would expand on the relationship with Wyoming. Wyoming has 90 to 95 percent of the Powder River coal reserves and so the methane gas reserves – Montana has about five percent. Wyoming's full build-out scenario will be about 40,000 wells. They have 4,000 producing wells now and have 15,000 wells permitted. Since Montana is down-river to the Powder and Tongue Rivers, Montana has expressed technical concerns to Wyoming on the merits of the way the permits are written and the Clean Water Act states that Wyoming has to respond to those concerns and they haven't as yet.

Mr. Compton said Wyoming has been working with Montana. Wyoming is anticipating not approving any additional direct charges to the Tongue River because of water quality concerns and their area of emphasis now is the Powder River. Wyoming has had a sort of free-for-all philosophy in this coal bed methane industry while Montana has proceeded more slowly. EPA suggested and Montana agreed to collaborate with Wyoming on a waste load allocation for the Powder and Tongue Rivers at the border that will drive upstream permitting practices. Something similar to the agreement Montana and Idaho have on the Clark Fork River for phosphorous. This agreement might be a ways off as the philosophies are different. One bright point is that Wyoming has agreed to protect the Montana irrigators on the Powder River by honoring the May or June high flow event by ensuring that at that time the water quality coming out of Wyoming is the same as it is now. Wyoming will probably do this by requiring water to be stored by operators in anticipation of this high water event. A more difficult situation will be reconciling the differences between Wyoming's nondegradation policy and Montana's regulations for nondegradation.

Mr. Raisch added that we need to remember that border targets will also need to be met by Montana as the rivers exit our state. The TMDL (total maximum daily load) on the Powder and Tongue Rivers will be the border target agreed upon. Rivers tend to add salinity as they proceed downstream so the target may be a little different but it will have repercussions on Montana landowners, ranchers, miners, and others. So it is important to meet with conservation districts and other interested parties on the border target.

Concerning fisheries, Mr. Compton said a lot of ground work has been done to maintain the fishery population among landowner, irrigators and local people. The biggest threat to the Big Hole was having adequate water to keep the temperatures at an acceptable level. A drought response plan has been developed with the Big Hole Watershed Group and part of that plan is as soon as certain monitoring reaches go to a certain temperature there is voluntary reduction of irrigation to leave more water in the river. If it goes still further down, the FWP will close all fishing in the relevant stretches. It is all voluntary and so far has worked. Work has been done with

landowners to develop off-site watering for livestock. It was found there is a lot of water diverted into watering ditches and as they are earth-lined it is very inefficient. Wells were dug and power provided for them and when the water is down diversions are shut off and the wells turned on. This was an option given to the ranchers and farmers rather than just saying "turn off your water."

Mr. Compton responded to a question on the salinity of the Powder River that 25 percent of the salinity is from the Salt Creek Oil fields in Wyoming and so has been unusable for irrigation except for the high flow when there is a lot of snow melt and rain diluting the flow.

Chairman Parks said he would encourage the broadest possible scope in the Coal Bed Methane EIS especially if the Board of Oil and Gas plans to use it as a substitute for their programmatic EIS. He said once an EIS is written the issuance of individual permits gets to be an administrative decision and therefore he felt this needed to cover the whole state as the Board of Oil and Gas covers the whole state. Then you would know where it could or could not be done as there are coal beds all over the state.

Mr. Raisch said the DEQ is recommending the wider view while BLM was interested in keeping it more focused. But he said research might identify areas that have no potential for coal bed methane gas and when that is the case there would be no point in spending a lot of money researching those areas.

Chairman Parks questioned holding the water for the period in the spring and then releasing it – would we be trading maintenance of water quality for 60 days for a substantial increase in degradation of water quality during low flows and how would this fit with public beneficial uses – like fish, wildlife, vegetation.

Mr. Compton responded that at low flow conditions Wyoming claims and Mr. Horpestad agrees that coal bed methane discharge from the Powder River Basin in Wyoming is higher quality water than what is in the Powder River now. He said he had a little trouble reconciling that point to the need to restrict water during high flow, other than the obvious one that snow melt and precipitation are of higher quality than both coal bed methane water and ambient water quality in the Powder River. But, at low flow conditions Wyoming coal bed methane discharged water is of higher quality and therefore will not degrade but actually improve water quality. Mr. Raisch added that each coal bed methane well has different types of water quality so in some cases this may not be true but in general coal bed methane water may be cleaner than the water in the Powder during low flow.

Mr. Compton said the coal bed methane industry worked its way up from Alabama, New Mexico, Utah, Colorado with gas at \$2 an mcf (thousand cubic foot) wholesale. This gas is now \$6 mcf and so the companies are eager to produce. He felt the industry would do what it was required to do in order to harvest that resource and they can afford to pay their way. Redstone has an application into the department for a large reservoir storage facility which Mr. Compton felt is a step in their stated intent of structuring their Montana operations so as to have no permanent discharge to surface water. Six or eight months ago Redstone talked about treatment and injection and this may be part of that plan. They are authorized to discharge 1600 gallons/minute and the reservoir may be used to offset the difference between allowable discharge and actual discharge from the 250 wells permitted by the Board of Oil and Gas.

A question was raised on the life span of these wells. The original thought was 8-15 years for the reservoirs. Each individual well has about an 8-10 year lifespan. Drilling goes on all the time so you might be talking production continuing about 20 years peaking probably in 8-10 years if everything goes as forecasted. The EIS has to look at what happens to these reservoirs after the fact – will you have a salt lake sitting there and what happens to it, high sodium content breaks down soil structures so do you have lots of erosion, how long will it take the aquifers to recharge, etc. There are a lot of issues that the EIS will need to address.

In response to a question of whether the local people favored the development, Mr. Raisch said most landowners were concerned and supported a cautious approach.

Chairman Parks asked concerning the auxiliary facilities needed in the development and their own accompanying water quality challenges – road building and pipeline right of ways. Mr. Compton said Wyoming has been supportive to this industry as they have received a revenue stream from the industry. He said south of Sheridan landowners formed an association and requested no more permits until an EIS was done and they are now in the

process of doing that. On the edges of Gillette there are well heads roughly every forty acres. They are not too intrusive. There is a brown fiber glass housing over the head, a small chainlink fence and a meter base on a post. All electric lines, gas gathering lines, and water disposal lines are buried.

Selection of Chair for Year 2001. Council Members

Members expressed their appreciation for the present chairman, Richard Parks, and asked if he would continue for another year. Mr. Parks agreed to do so.

Update on TMDL Lawsuit. Claudia Massman

On June 21, 2000, Judge Molloy issued an order requiring EPA and the State to develop TMDLs for all water bodies on the 1996 list and prohibiting EPA from issuing any new or increased permits until all necessary TMDLs were completed. The State, EPA, Intervenor, and Plaintiffs all filed motions to reconsider. On September 21 the judge issued an order denying the State and EPA's request for reconsideration of its Order. The judge, however, agreed to accept the plaintiff's motion to amend the Order to prohibit both EPA and the State from issuing any new or increased permits until all TMDLs were done. The prohibition against issuing new permits was problematic because the Department of Transportation (DOT) could not get authorization for many of its construction projects under the Department's general storm water permit. Based upon our interpretation of the Order, a new authorization under a general permit would be a new permitted discharge that was prohibited until all TMDLs had been completed. As a result of this interpretation, DOT cancelled 38 million dollars worth of projects for this fiscal year. DOT also estimated that the State would likely lose the entire amount of federal funding projected for the next fiscal year because DOT would not be able to award contracts and obligate the funds.

In view of the projected economic hardships resulting from the Order, the department filed a motion to stay the effect of the injunction pending appeal to the 9th Circuit. On November 3, 2000, the judge held a hearing on our motion. The judge did not agree that he had issued an injunction. Instead, the court agreed with the plaintiff's interpretation that the Order simply told the State to do what the law already required. The Department argued that the Order contains an injunction because there is nothing in the Clean Water Act that says you have to do all necessary TMDLs before you issue a permit. After the hearing, the Judge issued another order clarifying what was meant in the previous Orders. The last Order issued by the Court appeared to give the State some discretion in determining which waters still required TMDLs and whether or not a permit could be issued. Ms. Massman said the Department is evaluating the latest Order by trying to determine how much discretion is available to the department. Meanwhile the department, EPA, and the Intervenor have appealed the decision to the 9th circuit. Opening briefs are due March 5 and are scheduled until the end of April.

A question was asked as to how DOT received their federal grants. Ms. Massman said the judge disagreed with the department's interpretation of the general permit. The judge accepted the plaintiff's argument that this is an existing permit since the general permit was issued in 1997, and so it is not new and not an increased permit. Ms. Massman questioned what would happen when the general permit is renewed – which is up for renewal in a couple of years and all the TMDLs are not done. Ms. Lovelace said the ruling leaves all of her general permits in question.

Mr. Raisch added they had finished revising the 1996 list and the new 2000 list removes a considerable number of waters and puts them into a category that requires more information before it can be determined if they are impaired or not impaired. The new list is much shorter and was sent to EPA on December 1 for their approval. The department had hoped this list would have been the one acknowledged by the judge as the approved one but his order specifically says the 1996 list. The judge's order specified a schedule be in place by November 1 of when the TMDLs would be done. This has been done using the watershed approach – dividing the state into 91 watersheds. The amount of workload is dependent on whether the 1996 or 2000 list is followed.

In response to a question of needing to reply to EPA by January 15 on the projected costs to implement TMDLs, Mr. Raisch said the department had responded about six months ago to questions on this. He said Montana may have been a pilot and now they are following up on the other states. Mr. Raisch said the earlier request included questions about state and local government resources necessary to do the job. Barb Butler said she would forward a copy.

Next Meeting

Mr. Raisch said this year most meetings would be on the third Thursday. He said some of the meetings might be cancelled or conference calls if the agenda was light. Mr. Raisch said if there were substantive rule drafts to review, the group would probably need a face-to-face meeting because of the complexity and the dynamics. If just updates, the conference calls work well.

Mr. Keim has resigned from the advisory council. It was suggested that since he represented Trout Unlimited, they be asked for suggestions of a possible replacement, and also other groups such as Walleyes Unlimited, and eastern Montana rod and gun clubs or wildlife federation clubs – eastern Montana because the council at the present time is disproportionately composed of western Montanans. A list of names would then be presented to the governor to select the new member.

It was requested that more handouts be included in the packets sent to members before meetings so agenda items could be reviewed. The most recent list of members of the Board of Environmental Review was also requested.

The next meeting is scheduled for Thursday, February 15, 2001. Chairman Parks adjourned the meeting at 11:55 a.m.